No. 49263-6-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

PORT OF TACOMA, a Washington State Municipal Corporation; ECONOMIC DEVELOPMENT BOARD FOR TACOMA-PIERCE COUNTY, a Washington state Non-profit Corporation; TACOMA-PIERCE COUNTY CHAMBER, a Washington State Non-profit corporation, and CITY OF TACOMA, a Washington State Municipal Corporation,

Respondents,

v.

SAVE TACOMA WATER, a Washington political committee,

Appellant,
and

DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER, JON AND JANE DOES 1-5, (Individual sponsors and officers of SAVE TACOMA WATER); PIERCE COUNTY, a political subdivision by and through JULIE ANDERSON, IN HER CAPACITY AS PIERCE COUNTY AUDITOR,

Defendants.

BRIEF OF RESPONDENT CITY OF TACOMA

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I. INTRODUCTION

The Supreme Court's recent decision in *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution*, 185 Wn.2d 97, 369 P.3d 140 (2016) ("*Spokane*") controls the outcome of this case. In *Spokane,* the Supreme Court upheld the propriety of a pre-election challenge to a nearly identical local initiative and invalidated it on the same bases that apply here. Though tacitly acknowledging *Spokane* controls, Appellant Save Tacoma Water ("STW") asks this Court to depart from this binding authority, reject pre-election challenges and elevate local "community self-government" over state and federal law. The superior court properly rejected each of these efforts. This Court should affirm.

Following *Spokane*, the superior court properly ruled that the two initiatives at issue here, one Tacoma City Charter Amendment and one proposed city ordinance (collectively, "the Initiatives") are invalid and should not be placed on the ballot because they exceed the scope of the local initiative power. Specifically, because the Initiatives would require a public vote on applications for municipal water service by certain large water users in conflict with state and federal law, they attempt improperly to legislate in areas outside local power, intrude on administrative matters, and interfere with responsibilities delegated to the legislative authority of the City. The superior court appropriately recognized each of these fatal

flaws. Further, in denying STW's Motion to Dismiss, the court properly rejected STW's attack on the court's jurisdiction to hear pre-election challenges to local initiatives. Consistent with *Spokane* and substantial other binding authority, the superior court should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

The City assigns no errors.

B. Counterstatement of Issues.

1) Whether the superior court properly denied STW's Motion to Dismiss where the court's authority to hear pre-election challenges is well-established and does not implicate free speech and petition rights under the First Amendment to the United States Constitution and article I, sections 4 and 5 of the Washington constitution.

2) Whether the superior court correctly invalidated the Initiatives and enjoined their placement on the ballot because they exceed the scope of the local initiative power.

III. COUNTERSTATEMENT OF THE CASE

A. The City Provides Municipal Water Service Subject to State and Local Law.

The City has operated its own municipal water system for over 100 years. CP 259. The City does so through Tacoma Water, a division of Tacoma Public Utilities. *Id.* Tacoma Water provides retail water service

to the City's citizens and businesses. *Id.* Tacoma Water also provides retail water services to businesses and residences outside of the Tacoma city limits, including in the city of University Place, the town of Ruston, and portions of Federal Way, Puyallup, Bonney Lake, Fircrest, Lakewood, and unincorporated Pierce and King Counties. *Id.* Finally, Tacoma Water is also a wholesale purveyor, selling water to 14 other water utilities in Pierce and King Counties. *Id.*

The City's provision of municipal water service is subject to a broad statutory scheme regulating public water supplies. *See* RCW 43.20.050(2)(a). Under this scheme, RCW 43.20.260 and WAC 246-290-106 impose upon municipal water suppliers[1] a duty to provide retail water service to all new service connections within their retail service areas if four threshold factors are met: (1) the service can be available in a timely and reasonable manner; (2) the municipal water supplier has sufficient water rights to provide the water service; (3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the Department; and (4) the service is consistent with the requirements of local land use plans and regulations and the utility service extension ordinances of the city or town. *See also* CP 260. State law also

[1] The City is a "municipal water supplier" for purposes of RCW 43.20.260 and WAC 246-290-106. *See* RCW 90.03.015(3) (defining "municipal water supplier" as "an entity that supplies water for municipal water supply purposes").

requires water rates to be "just, fair, reasonable and sufficient", and prevents rate discrimination by water companies such as Tacoma Water. *See* RCW 80.28.010; RCW 80.28.090, RCW 80.28.100; *see also* RCW 80.28.110 (requiring water companies such as Tacoma Water to furnish water "as demanded" to "all persons and corporations who may apply therefore and be reasonably entitled thereto" upon "reasonable notice").

Consistent with the above state law and regulations, individuals and entities may apply to Tacoma Water for water service under Tacoma Municipal Code section 12.10.040. The application, when approved by Tacoma Water, constitutes a contract whereby the applicant agrees as a condition of water service to comply with the City's regulatory and rate scheme. *Id.*

B. The City is Committed To Providing Public Water Service Concurrent with Development.

Washington's Growth Management Act ("GMA"), Chapter 36.70A RCW, requires cities like Tacoma to adopt planning policies called "comprehensive plans" that address, among other things, "capital facilities" and "utilities" to ensure that there is an adequate level of public facilities and services in place to meet community needs over time. *See* RCW 36.70A.070(3), (4); *see also City of Seattle v. Yes For Seattle*, 122 Wn. App. 382, 388 n.1, 93 P.3d 176 (2004) (GMA requires local

legislative bodies to "develop comprehensive growth plans and development regulations to meet the comprehensive goals"). The GMA contemplates that cities planning under the GMA will balance the interests of "citizens, communities, local governments, and the private sector" in "comprehensive land use planning." RCW 36.70A.010.

The City's GMA-mandated Comprehensive Plan includes a "Public Facilities + Services" element ("PFS") that establishes the City's goals and policies with respect to public utilities like water. *See* CP 207-08, 211-56. For example, Policy PFS 4.6 establishes the City's intent to "[p]rovide public facilities and services that achieve the levels of service concurrent with development as defined in City code and Washington State Law." CP 208, 222. And under Policy PFS 4.7, the City has committed to "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy or use, or within a reasonable time as approved by the City, without decreasing current service levels below locally established minimum standards." CP 208, 222-23. Together, these Comprehensive Plan policies commit the City to provide public water service concurrent with development, including when "development" involves serving large water users. CP 209.

C. History and Purpose of the Initiatives.

The Initiatives are a response to citizen concerns regarding large water users, and specifically arose in opposition to a proposed (but now defunct) methanol refinery plant in the City. Both Initiatives contain extensive preambles expressing the Initiative sponsors' opinions and arguments in favor of the Initiatives.[2] CP 199, 202. Following the preambles, the Initiatives propose to add new municipal water regulations via a new Section 4.24 to the Tacoma City Charter (Charter Initiative) and a new ordinance under Title 12 of the Tacoma Municipal Code (Code Initiative)—both entitled "The People's Right to Water Protection." *Id.*

The Initiatives contain identical substantive terms. Part A of each Initiative requires a public vote on any applicant's request for water utility service where the applicant proposes to use one million gallons or more of water per day. Part B expressly purports to preempt state law that conflicts with the Initiatives, stating, "[t]o prevent subsequent denial of the People's Right to Water Protection by state law preemption, all laws

[2] For example, the preamble clauses state: "Residents of Tacoma do not want to return to our polluted past"; "the people want policies and contractual requirements to make industry secondary to the human needs of the citizens and households..."; "industries that use large amounts of water daily would place human, economic, environmental and homeland securities at risk"; "fresh potable water should take priority except in the case of emergency fire-fighting needs or any other natural disaster..."; "the sustained availability of affordable and potable water for the residents and businesses of Tacoma must be paramount over considerations such as potential tax revenues or investor profits"; and "a proposed methanol refinery does not meet the requirements of a clean, renewable and sustainable energy production facility". CP 199, 202.

adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of the City of Tacoma only to the extent that they do not violate the rights or mandates of this Article [Ordinance]." CP 199, 202. Part C purports to remove corporate "personhood" from "corporations that violate, or seek to violate the rights and mandates" of the Initiatives and further attempts to deprive state courts of jurisdiction to uphold any water license or permit that conflicts with the Initiatives. *Id.* Finally, Part D of each Initiative authorizes the City or any resident of the City to enforce the new water service provisions by court action, including an injunction to stop prohibited activities. It further provides for the recovery of damages and costs of litigation, including expert and attorney's fees. *Id.*

STW submitted signature petitions on the Code Initiative in June 2016. *See* CP 551-59. The Pierce County Auditor's Office verified the Code Initiative as having sufficient valid signatures. *See id.* Signature gathering for the Charter Initiative was ongoing at the time this action was filed.

D. Superior Court Proceedings.

On June 6, 2016, the Port of Tacoma ("the Port"), Economic Development Board for Tacoma-Pierce County, and the Tacoma-Pierce County Chamber filed this action alleging the Initiatives exceeded the

scope of the local initiative power and requesting that the superior court enjoin the City from placing the Initiatives on the general election ballot. CP 1-31. The complaint named the City as a defendant as well as STW, various individual sponsors and officers of STW, and Pierce County Auditor Julie Anderson. *Id.* The City filed an answer and cross claims against STW and Auditor Anderson, agreeing with the Plaintiffs that the Initiatives exceeded the scope of the initiative power and that their placement on the ballot would harm the City. CP 131-67.

In response to the City's and the Plaintiffs' Motions for Preliminary and Permanent Injunction, STW filed a "Motion to Dismiss for Lack of Jurisdiction over the Subject Matter", arguing (among other things) that pre-election review of initiatives is an illegitimate interference with the people's lawmaking process, violates several federal and state constitutional rights, and violates the principles of separation of powers and judicial restraint. CP 595-606.

The Pierce County Superior Court heard the motions on July 1, 2016.[3] *See* RP (Jul. 1, 2016). The court denied STW's Motion to Dismiss and found that the dispute was justiciable, that the City and Plaintiffs had standing to challenge the Initiatives, and that the court had subject matter

[3] Although STW noted its motion to dismiss for July 22, 2016, all parties agreed to consolidate the July 1, 2016 hearing on Plaintiffs' and the City's motions with the hearing on STW's motion to dismiss. RP (Jul. 1, 2016) at 18-26, 39.

jurisdiction. CP 674, 678; *see also* RP (Jul. 1, 2016) at 53-54. Pursuant to CR 65(a)(2), the court combined the request for preliminary relief with full consideration of the merits, and ruled that the Initiatives are invalid as outside the scope of the local initiative power, and also that the Initiatives are not severable. CP 677-78; *see also* RP (Jul. 1, 2016) 54-56. The court then granted a permanent injunction precluding either Initiative from being placed on the ballot. CP 677; *see also* RP (Jul. 1, 2016) at 54. STW appeals.

IV. ARGUMENT

The bulk of STW's brief is dedicated to asking this Court to reject decades of authority supporting pre-election review of local initiatives. Referring to the practice as a "judicial veto", STW argues that municipalities are entitled to vote on laws that conflict with state and federal law, as a component of a nebulous "right to community self-government" or as an expression of political speech. This is not the law in Washington. To the contrary, Washington courts have long upheld limited pre-election review of local initiatives. *See Spokane*, 185 Wn.2d at 102-10; *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 745-50, 620 P.2d 82 (1980); *Ford v. Logan*, 79 Wn.2d 147, 152-57, 483 P.2d 1247 (1971); *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 431-35, 260 P.3d 245 (2011); *City of Port Angeles v.*

Our Water-Our Choice, 145 Wn. App. 869, 872, 874-83, 188 P.3d 533 (2008); *Yes For Seattle*, 122 Wn. App. at 386-95. These cases allow for pre-election review of initiatives, like the ones here, that are beyond the scope of the local initiative power because they attempt to legislate in areas outside local power, intrude on administrative matters, and interfere with responsibilities specifically delegated to the City Council. The superior court's limited pre-election review of the Initiatives was proper, the Initiatives are invalid, and this Court should affirm.

A. Standard of Review.

A superior court's determination of its own subject matter jurisdiction is reviewed de novo as a question of law. *Landon v. Home Depot*, 191 Wn. App. 635, 640, 365 P.3d 752 (2015). Similarly, whether an initiative is beyond the scope of the local initiative power and, thus, subject to pre-election challenge, is also a question of law reviewed de novo. *City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 7, 239 P.3d 589 (2010).

B. There is No Right to "Community Self-Government" That Overrides State and Federal Law.

The majority of STW's brief is dedicated to urging the Court to create a "community right to self-government" that finds no support in Washington law. STW's arguments reflect a basic misunderstanding of

our nation's constitutional structure. The power of the people to govern themselves rests in the creation of states that operate under constitutions. While the Washington constitution recognizes the ability of state citizens to organize cities and counties, those municipal entities are always subject to state and federal law. *See City of Port Angeles*, 170 Wn.2d at 8 (under Washington constitution, municipal governments are not fully sovereign); *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 173, 149 P.3d 616 (2006) ("The sovereignty of the people of individual localities gives way to the people of the State's greater sovereignty, as expressed in the state constitution, through their representatives in the Washington State Legislature, and by the people through statewide legislative acts."); Wash. Const. art. XI, §§ 10, 11 (requiring that city charters and city regulations be consistent with and subject to state law); Wash. Const. art. I, § 2 (providing that the Constitution of the United States is the supreme law of the land). In other words, there is no inherent power of a municipality that is superior to the laws of the state and the state and federal constitutions. *See Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974) (municipal corporations are not exempt from legislative control; no inherent right to self-government); *Lauterbach v. City of Centralia*, 49 Wn.2d 550, 554, 304 P.2d 656 (1956) ("A municipal corporation is a body politic established by law as an agency of the state—partly to assist in the

civil government of the county, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district....It has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution."); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) ("Cities are limited governmental arms of the state"); *State v. City of Aberdeen*, 34 Wash. 61, 66, 74 P. 1022 (1904) ("A municipal corporation is a subordinate subdivision of the state government. It derives its existence, powers, and privileges from the state."). Whether the delegation of power from the state legislature to municipalities should be interpreted narrowly or broadly (the dichotomy described by STW as Dillon's Rule), it remains that the power of a municipality is a delegated one. It does not exist independently, as suggested by STW, and it is always subservient to state and federal law.

Relatedly, STW also fails to recognize that the limitations on local initiatives are simply extensions of the limitations on initiatives in general, including state initiatives. So, for example, in the same way that state initiatives cannot legislate on subject matters preempted by federal law, local initiatives cannot legislate on subject matters preempted by state law. These limitations on subject matter are enforced via limited pre-election

review, as demonstrated by decades of Washington cases. *See* Section C.1, *infra.*

Despite these well-established principles, STW argues that the people's initiative rights under the Tacoma City Charter give Tacoma residents a community self-governing power sufficient to reject state and federal law. Specifically, STW claims that because the Tacoma Charter was amended to provide initiative and referendum rights in 1909 and RCW 35.22.200 was passed in 1927, the "people's initiative power in charter cities derives from their inherent right of local community self-government—it is not a gift from the state legislature—and the courts lack jurisdiction to veto the people's proposed legislation." App. Br. at 30. This argument fails.

The initiative powers in Tacoma City Charter Section 2.18 and 2.19 are by their own terms subordinate to state law.[4] These limitations are in addition to the constitutional restrictions on charter cities found in article XI, sections 10 and 11 of the Washington Constitution, numerous

[4] Charter Section 2.18 ("Amendments to this charter may be submitted to the voters by the City Council or by initiative petition of the voters in the manner provided by the state constitution and laws."); Section 2.19 ("Citizens of Tacoma may by initiative petition ask the voters to approve or reject ordinances or amendments to existing ordinances, subject to any limitation on topics in state law…") (Emphasis added).

state statutes, and substantial binding authority expressly subordinating the local initiative power to state law. *Spokane*, 185 Wn.2d at 107 ("the local initiative power is limited to legislative matters that are within the authority of the city."); *see also Our Water-Our Choice*, 145 Wn. App. at 879 ("a local initiative can only create new law that is not inconsistent with or inapposite to state and federal law."); *Seattle Bldg. & Constr. Trades Council*, 94 Wn.2d at 747 (same); *see also Save Our State Park v. Bd. of Clallam Cnty. Comm'rs*, 74 Wn. App. 637, 644, 875 P.2d 673 (1994) ("The presence of broad initiative powers in a county home rule charter does not...justify unlimited application of that power. Initiative powers under a county charter must be consistent with the constitution and laws of the State of Washington."); RCW 35.22.120. The rule is the same with respect to the federal constitution. *See* Wash. Const. art. I, § 2 (providing that the Constitution of the United States is the supreme law of the land). As such, while STW's discourse on the American Revolution and the right of people to revolt in favor of self-government against unelected kings or dictators makes interesting reading, it does not amount to a legal argument that can save the Initiatives.

C. Washington Courts Have Jurisdiction to Hear Pre-Election Challenges to Local Initiatives.

As reaffirmed by the Supreme Court in *Spokane*, Washington courts have jurisdiction to hear declaratory judgment actions challenging local initiatives in advance of an election. Ignoring this binding authority, STW claims 1) that pre-election challenges violate the separation of powers doctrine; and 2) that state and federal constitutional rights of free speech preclude pre-election challenges to local initiatives. As the superior court properly ruled, neither of these arguments undermines its jurisdiction, nor has merit.

1. Pre-election Review of Local Initiatives Does Not Violate Separation of Powers Principles.

Though STW does not assign error to the superior court's ruling that this case is justiciable, STW nonetheless argues that a pre-election challenge to the Initiatives is not justiciable based on separation of powers principles. App. Br. at 30-33. While recognizing that the *Spokane* decision held the opposite, STW argues that "the trial court lacked authority to review the proposed initiatives by the people of Tacoma, just as the court would have lacked authority to review a proposed ordinance by the people's representatives in the Tacoma City Council." App. Br. at 33. Again, STW ignores binding Washington law.

The Supreme Court has repeatedly affirmed that pre-election challenges to the subject matter of local initiatives are justiciable and appropriate. As compared to the substance of an initiative or the prudence of a particular proposal, a subject matter challenge is grounded in the principle that the "subject of the proposed measure is either proper for direct legislation or it is not". *Coppernoll v. Reed*, 155 Wn.2d 290, 299, 119 P.3d 318 (2005). This type of review does "not raise concerns regarding justiciability because postelection events will not further sharpen the issue" of the suitability of a particular topic. *Id.* Thus, courts should invalidate local initiatives "where the subject matter of the measure was not proper for direct legislation" due to "the more limited powers of initiatives under city or county charters". *Id.* As the Washington Supreme Court has emphasized, "[i]t would violate the constitutional blueprint to allow a subdivision of the State to frustrate the mandates of the people of the State as a whole." *1000 Friends*, 159 Wn.2d at 168.

As such, the Supreme Court has expressly (and recently) held that pre-election review to determine whether a local initiative exceeds the scope of the initiative power presents a justiciable controversy. As detailed below, this inquiry asks whether the initiative seeks to legislate in areas outside local power, intrudes on a municipality's administrative matters, or interferes with responsibilities delegated to the legislative

authority of the city as opposed to the electorate. *Spokane*, 185 Wn.2d at 107-08. The superior court's analysis was properly limited to the claim that both Initiatives are invalid for each of those reasons. In sum, the superior court had jurisdiction over this justiciable dispute.

2. Pre-Election Review of Local Initiatives Does Not Violate Free Speech Rights.

STW further contends that courts lack authority to hear pre-election challenges under the First Amendment to the United States Constitution and article I, sections 4 and 5 of the Washington constitution. But, as detailed below, there is no free speech right to vote on an invalid initiative, and as such, this argument also fails.

As a threshold matter, this Court recently rejected an identical challenge, and should apply the same analysis here. In *City of Longview v. Wallin*, 174 Wn. App. 763, 301 P.3d 45 (2013), *review denied*, 178 Wn.2d 1020, 312 P.3d 650 (2013), an initiative sponsor claimed that pre-election review of a local initiative infringed on his rights to petition the government and to free speech, as protected by the First Amendment and article I, sections 4 and 5 of the Washington constitution. This Court distinguished the state initiative power from the local initiative power, correctly noting that "the 'constitutional preeminence of the right of initiative' discussed in *Coppernoll* is not a concern in the present case, and

the local powers of initiative do not receive the same vigilant protection as the constitutional powers addressed in *Coppernoll*". *Wallin*, 174 Wn. App. at 790. While agreeing that "the initiative process can involve protected political speech", *see id.* at 791, this Court held that the ability to circulate the initiative petition for signatures and to submit the petition to the county auditor to have the signatures counted sufficiently protected the sponsor's constitutional rights. *Id.* at 791-92; *see also Meyer v. Grant*, 486 U.S. 414, 421-22, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) ("[T]he circulation of [an initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'") (emphasis added); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192-205, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) (holding that various restrictions on petition circulation infringed on First Amendment rights). Finally, this Court rejected the notion that sponsors had "a First Amendment right to have any initiative, regardless of whether it is outside the scope of the initiative power, placed on the ballot." *Wallin*, 174 Wn. App. at 791-92.[5]

Here, as in *Wallin*, STW had the opportunity to gather signatures for its initiative petitions, submit them to the county auditor, and have

[5] STW mentions *Wallin* in a footnote but does not analyze or address this Court's political speech discussion other than to inaccurately characterize it as "scant" and lacking in "stare decisis value." *See* App. Br. at 34-35 n.26.

them counted. The "protected political speech, obtaining signatures for the petition[s], was not impaired here." *Wallin*, 174 Wn. App. at 792. *Wallin* controls. STW cites no authority requiring a municipality to place an invalid initiative on the ballot based on a free speech rationale, and the City is aware of none.

STW relies heavily on *Meyer*, but that case is not on point. *Meyer* involved a state statute that prohibited payment of initiative petition circulators. The United States Supreme Court found the statute invalid as an unconstitutional restriction on free speech, holding that the restriction on payment of petition circulators restricts political expression by limiting the number of voices who will convey the message, limiting the size of the audience they can reach, and making it less likely that sufficient signatures will be garnered to place the initiative on the ballot. *Meyer*, 486 U.S. at 422-23. *Meyer* has no application to a challenge to placing an initiative on the ballot as beyond the scope of the local initiative power.

Moreover, citing *Meyer*, the Ninth Circuit has held that "[t]here is no First Amendment right to place an initiative on the ballot." *Angle v. Miller*, 673 F.3d 1122, 1133 (9th Cir. 2012). And other courts have come to similar conclusions. *See Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) ("Although the First Amendment protects political speech incident to an initiative campaign, it does not

protect the right to make law, by initiative or otherwise."); *Skrzypczak v. Kauger*, 92 F.3d 1050, 1053 (10th Cir. 1996), *overruled on other grounds in Walker*, 450 F.3d 1082[6]; *Wright v. Mahan*, 478 F.Supp. 468, 474 (E.D. Va. 1979) ("[A] right to petition for, have access to the ballot for, and vote in a municipal initiative election, is a wholly State created right, and is not a right secured by the federal Constitution....").

In sum, pre-election review to determine whether a local initiative is within the scope of the initiative power does not implicate free speech or petition rights, nor undermine the court's jurisdiction. The superior court properly denied STW's Motion to Dismiss for lack of jurisdiction and should be affirmed.

D. The Initiatives Exceed the Scope of the Local Initiative Power.

STW gives cursory treatment to the central issue before the Court, namely, whether the Initiatives exceed the scope of the local initiative power. As detailed below, STW fails to address several of the grounds cited by the superior court for invalidating the Initiatives and cannot meaningfully distinguish *Spokane* or the other cases that require affirmance.

[6] "Skrzypczak mistakenly conflates her legally-protected interest in free speech with her personal desire to have SQ 642 on the ballot. In removing SQ 642 from the ballot, the Oklahoma Supreme Court has not prevented Skrzypczak from speaking on any subject. She is free to argue against legalized abortion, to contend that pre-submission content review of initiative petitions is unconstitutional, or to speak publicly on any other issue. Her right to free speech in no way depends on the presence of SQ 642 on the ballot."

As a threshold matter, STW argues that when evaluating the merits, this Court must find the Initiatives invalid "beyond a reasonable doubt" in order to keep them off the ballot. But STW cites no cases applying the presumption of constitutionality to an initiative (or any law) that has not yet been passed. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) ("A statute enacted through the initiative process is, as are other statutes, presumed to be constitutional.") (emphasis added); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (same); *State v. Stannard*, 134 Wn. App. 828, 834, 142 P.3d 641 (2006) ("We presume that statutes enacted through the initiative process are constitutional.") (emphasis added). STW cites only cases involving enacted laws and initiatives. *See* App. Br. at 40-41. This makes sense, as there is no basis to presume constitutional a mere proposal by a lawmaker or a group of citizens.

Regardless, even if a heightened burden applied (which it does not), the Initiatives are well outside the scope of the local initiative power. Just as in *Spokane*, the Initiatives here conflict with state and federal law, intrude on administrative matters, and interfere with responsibilities delegated to the City Council. *Spokane*, 185 Wn.2d at 107-08. The

superior court properly invalidated the Initiatives for each of these reasons.

1. The Initiatives Conflict with State and Federal Law.

In Washington, "the provisions of a local initiative must be within the scope of the authority of the city itself." *Spokane*, 185 Wn.2d at 108. Thus, the people cannot enact local legislation that conflicts with state or federal law. *Id.* ; *see also* Wash. Const. art. XI, §§ 10, 11 (authorizing municipal charters "consistent with and subject to the Constitution and laws of this state" and allowing local governments to adopt regulations "not in conflict with general laws"); RCW 35.22.120 (city charter amendments only allowed to address matters "within the realm of local affairs, or municipal business"). "[A] local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits." *Parkland Light & Water Co. v. Tacoma-Pierce Cnty. Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004) (invalidating resolution that conflicted with statutory authority granted to water districts). Here, multiple provisions of the Initiatives conflict with state law and federal law, and were properly invalidated on this basis.

a) *The Public Vote Requirement Conflicts with State Law.*

Part A of both Initiatives contains a provision that requires a public vote on any application for municipal water service that exceeds one

million gallons per day. This provision conflicts with numerous state laws governing the provision of municipal water service and is therefore invalid.

For example, RCW 43.20.260 imposes a "duty to provide retail water service" on Tacoma Water so long as it has sufficient capacity (as determined by the Department of Health), adequate water rights, and it can provide the service in a safe and timely manner consistent with applicable comprehensive plans and development regulations. WAC 246-290-106 echoes these statutory requirements. RCW 80.28.110 likewise requires Tacoma Water to furnish water "as demanded" upon "reasonable notice." Nothing in the applicable statutes or regulation allows the duty to provide water service to be conditioned on a public vote. Moreover, such a requirement is in direct conflict with the requirement that the Department of Health (not the voters) determine the capacity to serve water in a safe and reliable manner. As such, the public vote requirement conflicts with state law.

Similarly, the Initiatives' public vote provisions conflict with state law because they seek to impose an additional charge for water service on large water users. Specifically, the Initiatives require a large water user to pay for the cost of any election held on the user's water application. Imposing these costs on large water users alone is contrary to the

requirements of RCW 80.28.100, which expressly prohibits rate discrimination. Singling out large water users and forcing them to pay election costs likewise conflicts with RCW 80.28.090, which prohibits subjecting "any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[7]

Finally, the public vote provision conflicts with the City's Comprehensive Plan under the state GMA, including but not limited to Policies PFS 4.1, 4.5, 4.6, and 4.7—which, taken together, commit the City to provide public water service concurrent with development. As noted above, RCW 43.20.260 requires the City to grant applications for water service that are consistent with the City's Comprehensive Plan. By requiring a public vote, the Initiatives are inherently inconsistent with the City's plan and its policies for the provision of utility services like water.

STW only selectively addresses the above conflicts.[8] First, with respect to the City's duty under RCW 43.20.260 to provide retail water service, STW speculates that in the event of a future water shortage, applicants for water service may not meet one or more of the statutory

[7] Requiring applicants to pay for the cost of a public vote also conflicts with RCW 29A.04.410, which provides that "[e]very city, town, and district is liable for its proportionate share of the costs when such elections are held in conjunction with other [general and special elections]."

[8] STW does not dispute that the Initiatives conflict with RCW 80.28.100, RCW 80.28.110, and RCW 80.28.090.

factors. That speculation is irrelevant to whether the Initiatives, if enacted, would conflict with the City's statutory duties by conditioning the City's duty to provide water service on a public vote. Moreover, STW cites no authority requiring the City to "show with specificity" an "actual conflict" between its GMA-mandated comprehensive plans and the Initiatives. Rather, the Supreme Court has twice invalidated initiatives implicating matters covered under the GMA, such as water use. *See Whatcom Cnty. v. Brisbane*, 125 Wn.2d 345, 349-50, 884 P.2d 1326 (1994); *1000 Friends*, 159 Wn.2d at 168-69, 183-85. In sum, the superior court properly ruled that the public vote provisions conflict with state and federal law and are thus invalid.

b) The Initiatives' Preemption Provisions Conflict with State and Federal Law.

The superior court correctly determined that the Initiatives also exceed the scope of the initiative power because multiple provisions expressly purport to preempt superior law. It is black letter law that a city's legislative power—whether exercised by the city council or its residents—is limited and subordinate to superior law, be it state or federal:

> While the inhabitants of a municipality may enact legislation governing local affairs, they cannot enact legislation which conflicts with state law....The fundamental proposition which underlies the powers of municipal corporations is the subordination of such bodies to the supremacy of the legislature.

Seattle Bldg. & Constr. Trades Council, 94 Wn.2d at 747 (citations

omitted); *see also* Wash. Const. art. XI, §§ 10, 11 (requiring that city charters and city regulations be consistent with and subject to state law); Wash. Const. art. I, § 2 (providing that the Constitution of the United States is the supreme law of the land).

The Initiatives' preemption provisions in Parts B and C violate the above principles. The Initiatives purport directly to preempt state law, stating "all laws adopted by the legislature of the State of Washington, and rules adopted by any state agency, shall be the law of City of Tacoma only to the extent that they do not violate [the rights guaranteed by the Initiatives]." CP 199, 202. The Initiatives further attempt to evade federal and state preemption by removing corporate entities' ability to assert "international, federal, or state preemptive laws" in challenging the Initiatives. *Id.* The Initiatives thus exceed the scope of the local initiative power because they conflict with and purport to preempt state, federal, and international law, contrary to article XI, sections 10 and 11 and article I, section 2 of the state constitution.

STW does not deny that the Initiatives contain provisions that purport to preempt state and federal law. Instead, STW claims that international law and "ancient legal principles" such as the public trust doctrine support a general "people's right to water" that would be immune from state or federal preemption. *See* App. Br. at 47. No United States or

Washington court has ever adopted STW's novel preemption theory. Moreover, STW misunderstands the "public trust" doctrine, which vests the state with certain obligations over public resources, not the people in general (or the voters of a specific municipality). *See Caminiti v. Boyle*, 107 Wn.2d 662, 669-75, 732 P.2d 989 (1987). Finally, there is no support for STW's claim that the City needs to show "concrete facts" in order to evaluate the City's preemption claims. No further facts are needed, as the text of the Initiatives plainly reveals the Initiatives' intent to preempt superior law. As a result, the Initiatives are invalid on their face and the superior court properly ruled they are beyond the scope of the initiative power.

c) The Initiatives' Limits on Corporations Conflict with State and Federal Law.

The superior court properly determined that the Initiatives' corporate personhood provisions in Part C also conflict with federal and state law because they attempt to deprive corporations of their personhood rights, a subject beyond the scope of the local initiative power.

Federal law guarantees certain rights and protections to corporations, including due process, equal protection, and free speech. *See, e.g., Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189, 8 S.Ct. 737, 31 L.Ed. 650 (1888) (equal protection);

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342-43, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (free speech). Washington law also treats corporations as "persons" including the right to sue and be sued "in like cases as natural persons." Wash. Const. art. XII, § 5; *see also* RCW 23B.03.020(2) ("every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation, power: (a) To sue and be sued, complain, and defend in its corporate name....").

The Initiatives' corporate personhood provisions would strip these rights and protections from corporations that "violate, or seek to violate the rights and mandates" of the Initiatives. Specifically, the Initiatives would deprive corporations of their right to sue and defend against lawsuits related to the Initiative's provisions. *See* CP 199, 202 (corporations that violate or seek to violate the Initiatives "shall not be deemed 'persons'...nor shall corporations possess any other legal rights, powers, privileges, immunities, or duties that would interfere with the rights or mandates enumerated by [the Initiatives]."). Both Initiatives specifically remove corporations' rights to assert legal defenses, including "international, federal, or state preemptive laws in an attempt to overturn [the Initiatives]" and the "power to assert that the people of the City of Tacoma lacked the authority to adopt [the Initiatives]." *Id.*

Again, *Spokane* decides the issue. The *Spokane* Court invalidated a very similar charter amendment initiative provision that would have stripped the legal rights of any corporation that violated the rights secured in the proposed charter amendment. The Court noted that the provision "appear[ed] to be a response to the United States Supreme Court's decision in [*Citizens United*], which held that corporations have speech rights under the federal constitution." *Spokane*, 185 Wn.2d at 109-10. The Court held that the initiative was outside the scope of the local initiative power, noting that municipalities "cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court." *Id.* at 110. The superior court here correctly reached the same conclusion with respect to the Initiatives' corporate personhood provisions.

STW makes no attempt to explain how the Initiatives' corporate personhood provisions comport with the protections that state and federal law confer upon the City's corporate citizens. STW instead contends that this Court should weigh "the rights of the people against the purported 'rights' of corporate parties" and that this Court needs additional "facts" to do so. App. Br. at 48. STW again cites no relevant authority for this argument, nor attempts to distinguish *Spokane*, which is directly to the contrary.

Finally, STW contends that the Initiatives' corporate personhood provisions are valid because "corporations are subservient to both the people and their governments". App. Br. at 48. But the only case STW relies upon for this argument concerns whether corporations can claim the protection of the privileges and immunities clause of the Fourteenth Amendment and is irrelevant here. *See* App. Br. at 48; *Adult Entm't Ctr., Inc. v. Pierce Cnty.*, 57 Wn. App. 435, 446 n.7, 788 P.2d 1102 (1990). In short, *Spokane* controls. The Initiatives' corporate personhood provisions exceed the scope of the local initiative power and are invalid.

In sum, because of these conflicts with state and federal law, the superior court properly found the Initiatives exceed the scope of the initiative power and are invalid.

2. The Initiatives Exceed the Scope of the Local Initiative Power Because They Are Administrative In Nature.

It is well-established that the local initiative power does not "encompass[] the power to administer the law, and administrative matters, particularly local administrative matters, are not subject to initiative or referendum." *City of Port Angeles*, 170 Wn.2d at 8; *see also Spokane*, 185 Wn.2d at 107 (same) . Here, the City has already adopted a comprehensive regulatory scheme for providing municipal water service.

The Initiatives seek to disrupt that scheme, and as a result, are administrative in nature and beyond the scope of the local initiative power.

"Generally speaking, a local government action is administrative if it furthers (or hinders) a plan the local government or some power superior to it has previously adopted." *City of Port Angeles*, 170 Wn.2d at 10; *see also Spokane*, 185 Wn.2d at 107. To determine whether an initiative concerns legislative or administrative matters, courts ask "whether the proposition is one to make new law or declare a new policy, or merely to carry out and execute law or policy already in existence." *City of Port Angeles*, 170 Wn.2d at 10 (citation omitted). For example, in *Spokane*, the Supreme Court invalidated a local initiative provision that would have required local voters to approve any proposed zoning changes involving large developments. *Spokane*, 185 Wn.2d at 108. The City of Spokane had in place established processes for regulating zoning and development. *Id.* Because the initiative provision would modify those processes, it "[fell] under [the Court's] description of an administrative matter since it [dealt] with carrying out and executing laws or policies already in existence." *Id.*

Trying to sidestep this authority, STW circuitously claims (without citation) that the Initiatives constitute "[a] proposal to create a new policy where the people vote on whether large new water users may apply to

Tacoma Water" and asserts this proposal "is clearly legislative because it makes a new policy."[9] App. Br. at 44. *Spokane* is to the contrary. Similar to the *Spokane* case, here, the City has already adopted regulations, processes, and policies consistent with state law governing the provision of municipal water service. City-owned Tacoma Water administers this regulatory scheme. The Initiatives would hinder implementation of the City's and state's existing public water regulation scheme by inserting a citizen vote process in place of the statutory factors giving rise to Tacoma Water's duty to provide water service "as demanded", as well as the City's GMA-mandated Comprehensive Plan governing provision of that service. *See* RCW 80.28.110; RCW 43.20.260; WAC 246-290-106; see also CP 207-56. As such, because the Initiatives "deal[] with carrying out and executing laws or policies already in existence," they are administrative in nature and thus beyond the scope of the local initiative power. *See Spokane*, 185 Wn.2d at 108; *see also Durocher v. King Cnty.*, 80 Wn.2d 139, 153-54, 492 P.2d 547 (1972) (holding that county council's decision to "grant[]... a permit pursuant to an established zoning ordinance" was an

[9] In doing so, STW appears to draw a line between initiatives establishing rules that would apply to all large new water use applications and initiatives preventing one specific application. *See* App. Br. at 44. This distinction is not supported in the law. In either circumstance, under the facts here the Initiatives would interfere with an existing superior regulatory scheme.

administrative act not subject to local referendum). The superior court should be affirmed.

3. The Initiatives Improperly Intrude Upon Powers Delegated Exclusively to the City Council.

"[A] local initiative 'is beyond the scope of the initiative power if the initiative involves powers granted by the legislature to the governing body of a city, rather than the city itself.'" *Spokane*, 185 Wn.2d at 108 (quoting *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006)). Here, the Initiatives attempt to usurp the powers granted to the Tacoma City Council under the GMA. The GMA delegates to city councils and county commissions—not to the City itself or its electorate—the authority and obligation to develop comprehensive growth plans, which affect the provision of municipal water service. *See, e.g.*, RCW 36.70A.040; RCW 36.70A.110; RCW 36.70A.210; *Brisbane*, 125 Wn.2d at 349-51; *1000 Friends*, 159 Wn.2d at 169; *Yes For Seattle*, 122 Wn. App. at 388-93. Thus, citizens cannot use the initiative process to enact development regulations or otherwise impose controls on development under the GMA.[10] *See, e.g., Brisbane*, 125 Wn.2d at 349-51.

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[10] The GMA defines "development regulation" as:

> "Development regulations" or "regulation" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A

The Washington Supreme Court has held that initiatives addressing water regulation are beyond the scope of the local initiative power for this precise reason. *See 1000 Friends*, 159 Wn.2d at 168-69, 183-85 (ordinances enacted under GMA governing wetlands, aquatic areas, and storm water not subject to referendum); *see also Yes For Seattle*, 122 Wn. App. at 388-91 (creek restoration initiative beyond local initiative power). Here, pursuant to the GMA's requirements, the Tacoma City Council has enacted a Comprehensive Plan that addresses municipal water service in the context of development planning. The Initiatives, however, purport to give City residents the right to approve (or disapprove) municipal water service applications for certain users. In doing so, the Initiatives improperly attempt to place controls on development and, thus, impermissibly usurp powers granted exclusively to the legislative body of the City under the GMA. For this additional reason, the superior court properly invalidated both Initiatives.

STW does not address this argument except to claim that "finding a power has been delegated to the legislative body requires more

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> development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city.

RCW 36.70A.030(7).

specificity than citing an entire statutory title"[11] and that the Initiatives are "not governed by the [GMA] " because they exercise "a power held by the people." App. Br. at 44-45. STW cites no relevant authority in support of these assertions, nor could it, as both are contrary to the well-established law discussed above. This Court should affirm.

4. The Initiatives Are Invalid to the Extent They Limit the Courts' Authority to Interpret or Apply the Law.

Finally, the superior court properly invalidated the Initiatives on the grounds that they purport to remove the power of the courts to determine the validity of any action that would violate the rights secured in the Initiatives. *See* CP 199, 202 ("no government actor, including the courts, will recognize as valid any permit, license, privilege, charter, or other authorization, that would violate the rights or mandate of this Article [Ordinance], issued for any corporation, by any state, federal, or international entity."). STW does not address this issue in its opening brief and, thus, waives any related challenge to the court's ruling. Nevertheless, the superior court properly ruled that these provisions exceed the scope of the local initiative power because they conflict with superior law. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504-05, 198 P.3d 1021 (2009) (the fundamental function of the judicial

[11] STW refers to the superior court's finding that the Initiatives "involve[] powers delegated under RCW Title 35 to the legislative bodies of municipalities." CP 675.

branch is judicial review, including the authority to interpret the law); RCW 2.08.010 (establishing original jurisdiction of superior courts for, among other things, "all cases in equity").

In sum, while any of the above reasons would be sufficient, the superior court properly ruled that, for each of these reasons, the Initiatives exceed the scope of the local initiative power and cannot be placed on the ballot.

E. The Superior Court Correctly Determined the Initiatives Are Not Severable.

As detailed above, each of the substantive provisions in the Initiatives is invalid and outside the scope of the local initiative power. Specifically, Part A requires a public vote on a water application in contravention of multiple provisions of state law, Part B expressly purports to preempt state and federal law that conflicts with the Initiatives, and Part C unlawfully revokes the constitutional and statutory rights of corporations and restricts the power of the state courts.

STW has never identified any valid portions of the Initiatives that might be "grammatically, functionally, and volitionally severable" from the invalid portions. *See McGowan v. State*, 148 Wn.2d 278, 295, 60 P.3d 67 (2002). To the contrary, no portion of the Initiatives can be severed and upheld. *League of Women Voters of Wash. v. State*, 184 Wn. 2d 393,

411-12, 355 P.3d 1131 (2015), *as amended on denial of reconsideration* (Nov. 19, 2015) (initiative not severable where "elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes."). The superior court thus correctly concluded that the "STW Initiatives are not severable" because "[a]ll substantive provisions of both Initiatives are invalid" and when "the Initiatives' substantive provisions A-C are held invalid, the enforcement, severability, and effect sections are moot." CP 677. Thus, the Initiatives are invalid in full.

V. CONCLUSION

The City supports the rights of its citizens to utilize the initiative process and welcomes citizen participation in City government. Efforts to do so, however, must comport with state and federal law. As in *Spokane*, the superior court here properly engaged in a pre-election review of the Initiatives and ruled they exceed the scope of the local initiative power in multiple respects. The City respectfully asks this Court to affirm.

RESPECTFULLY SUBMITTED this 10th day of February, 2017.

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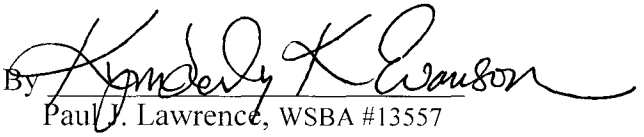
By 

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Respondents,

v.

SAVE TACOMA WATER, a Washington political committee,

Appellant,

and

DONNA WALTERS, sponsor and Treasurer of SAVE TACOMA WATER, JON AND JANE DOES 1-5, (Individual sponsors and officers of SAVE TACOMA WATER); PIERCE COUNTY, a political subdivision by and through JULIE ANDERSON, IN HER CAPACITY AS PIERCE COUNTY AUDITOR,

Defendants.

No. 49263-6-II

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I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto. On the 10th day of February, 2017, I caused to be served a true copy of the following documents upon the parties listed below:

1. Brief of Respondent City of Tacoma; and

2. Proof of Service

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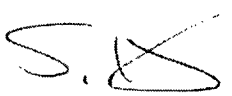
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of February, 2017.



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